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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAYSHAWN VISA PIERCE, Defendant and Appellant.	C060588 (Super. Ct. No. 06F04599)

A jury convicted defendant Jayshawn Pierce of the murder and attempted robbery of Kevin Wilson and the attempted robbery of Anna Vasquez. The jury found true the special circumstance allegation that the murder occurred during the attempted commission of a robbery. The jury found not true an allegation that defendant personally and intentionally used a shotgun causing the death of Wilson. The trial court sentenced defendant to life in prison without the possibility of parole

for the special circumstances murder, plus two years and eight months for the attempted robberies.

Defendant argues there was insufficient evidence to support the jury's finding of the felony-murder special circumstance because an accidental killing cannot be committed for an independent felonious purpose. He claims evidentiary error in the admission of a movie clip and of evidence of prior bad acts. He argues instructional error with respect to the felony-murder special circumstance instruction, and claims the trial court should have sua sponte instructed on involuntary manslaughter as a lesser included offense. He challenges the constitutionality of the felony-murder special circumstance statute. He argues the trial court should have given him a *Marsden* hearing when he told the probation officer post-conviction that his trial counsel had been ineffective. Finally, he claims his sentence for attempted robbery of Wilson should have been stayed and he should have been awarded presentence custody credits.

We shall direct the trial court to stay the sentence on count 2 (attempted robbery of Wilson) and change the sentence for count 3 (attempted robbery of Vasquez) from eight months to two years. We shall otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The motivation for the robbery that resulted in Wilson's murder was the acquisition of bail money for C.J. Finley. Finley was a pimp who was in jail in San Bernardino County on a gun charge. Finley and defendant were close friends.

Germannell "Keisha" Jones was Finley's girlfriend, and Marquita Bevans was Finley's cousin.

On the afternoon of May 21, 2006, defendant called Freddie Rimpson and asked him if he wanted to "hit a lick," meaning rob someone. Defendant told Rimpson he wanted to hit a lick because he had to "get my Nigga out of jail." Rimpson refused. Defendant had "hit some licks" with Finley before.

Also on the afternoon of May 21, 2006, Jones and Bevans were getting dressed up to go have some "casual dates" which meant they were going to prostitute themselves in order to get money to bail Finley out of jail. After they got dressed for their "dates," but before going out, defendant called Jones and told her to come over and see his daughter.

Jones and Bevans picked up defendant from a house in Oak Park. Defendant came out of the house with a shotgun that was wrapped up. Defendant told Jones he wanted to drop the shotgun off at his home. They went to defendant's house, and he took the shotgun into the house. After leaving defendant's house, they went to Finley's mother's house, where they spent some time drinking. They stayed there until around 9:00 p.m.

Around 9:00 p.m., they picked up Rimpson, and went back to defendant's house. They stayed there about 20 minutes, then went to a bar called Bobby T's. Sometime after midnight, Jones and Bevans were walking around the parking lot talking to guys. They did not get any "dates," but did manage to get a phone number for a future "date." Defendant suggested they call the number and take the "date" to a room up the street where

defendant would come in and rob the person. Jones refused because she was not "into" robbing people.

They went to another club called the Idle Hour. It was after 1:00 a.m. They parked across the street and were waiting for people to come out of the club. A couple, Wilson and Vasquez, came out who appeared intoxicated. They were kissing. They got into their vehicle and continued kissing. When the couple drove off, defendant, Jones, Bevans, and Rimpson followed them.

Defendant was driving. At some point he sped up and cut in front of the other car, but Wilson swerved around him. Defendant stopped the car, and Rimpson went to the trunk to retrieve the shotgun. Defendant continued following Wilson and Vasquez for another three blocks or so to an apartment complex. Defendant told Rimpson that they were going to "get a lick" referring to Wilson's black car. Defendant asked one of the girls if it was good, and she replied that it was. When they reached the apartment complex, Wilson came up to the car defendant was driving, yelling and asking why they were following him.

Rimpson then stood up through the sun roof with the shotgun. Defendant yelled at Rimpson to get out of the car, but Rimpson did not get out. At some point Rimpson sat back down in the car, defendant told Rimpson to give him the shotgun, and defendant got out of the car with the shotgun. Defendant pointed the shotgun at Wilson and Vasquez. Defendant said, "Give me your shit[,]" or something to that effect. Wilson and

Vasquez had their hands up. Vasquez had a purse. They both said, "Take it." Wilson responded that they did not want any trouble.

Defendant then shot Wilson between the eyes, killing him instantly. One eye was completely obliterated. The medical examiner estimated defendant was standing four to five feet from Wilson when he fired the shotgun. Vasquez sustained injuries to her hands from the shotgun blast.

Bevans and Jones were hysterical and scared, and yelled "[L]et's go, let's go!" Defendant jumped back in the car and said, "I domed him." They went back to Jones's house. Defendant asked Jones if he could put the shotgun under her mattress, and she agreed. Later that day Rimpson got the shotgun and disposed of it in a dumpster. He then called Crime Alert.

Defendant spoke to Finley, who was in jail, the afternoon of the shooting. Their conversation was recorded, and the relevant part was as follows:

> "Finley: What happened, my nigger?
>
> Pierce: You talking about last night?
>
> Finley: Hey, what happened? My nigger kill game, talk baseball, my nigger. What happened?
>
> Pierce: Okay. Well, . . . we was on some . . . an [LIQ, i.e., lick], you feel me? . . . Trying to look, get some chalupa to get my . . . so I can get some bail. . . . So I'm trying to think who I can bring with me, who I know you

wouldn't really trip over having around your wifey. . . . So I go get my cousin, you know who. . . . I take him with me . . . . We spot somebody, like, oh, and it is all good. Yeah and she says like that's the one -- that's the one. I'm like, okay, ... [a]nd then we follow, woo. . . . I follow him in and, nigger, I -- my finger slipped, nigger.

Finley: Huh?

Pierce: The finger slipped. . . . Man. It was bad.

Finley: It was ugly for 'em?

Pierce: Man, nigger, I mean, like Men in Black. Oh, that really hurts.

Finley: Man. Well, did -- did you get any chalupa?

Pierce: No 'cause come on, come on, come on. Let's go - go, let's go.[']

Finley: That's my girl.

Pierce: But, I mean, I was like . . . suppose to grab a --the, um, -- what the call it, the, uh, thing female bag bad I say. . . .

Finley: Now, what'd you say, you was supposed to grab the what?

Pierce: The pouch. . . . But this nigger, Cutty, . . . didn't want to get out the car. He's standing out the sunroof like -- just like . . . And I'm like, get the fuck out the car so I can do what I need to do. . . . He didn't want to leave out the car. So it's like I couldn't do two things at once. . . So I -- I hop out of the

car, nigger and get it moving . . . . So nigger we was gonna go do another one, but we -- um, she was like we need a (Unintelligible) to go . . . . So I'm not worried about her, but my Cutty . . . Nigger, this nigger came over here crying this morning, nigger. Telling me the nigger DEAD. . . .

Finley: [T]hat boy bitched up like that?

Pierce: Nigger, came over here crying, nigger.

Finley: Hell, no, my nigger, that ain't solid, bro.

Pierce: I'm like, my nigger, what - everybody at that house where he live know about it. . . .

Finley: Oh, my God, my nigger. . . .

Pierce: I know what I gotta do."

Defense counsel argued to the jury that: (a) Rimpson was the shooter, (b) there was no intent to rob anyone, and (c) the shooting was accidental.

DISCUSSION

I

Felony-Murder Special Circumstance

Penal Code section 190.2 provides in relevant part:

> "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: . . .
>
> . . . . . .

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
>
> (A) Robbery in violation of Section 211 or 212.5."

Defendant focuses on the Supreme Court's language in *People v. Green* (1980) 27 Cal.3d 1, 61 (*Green*)(overruled on another point by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3), where the court, in examining this statute, indicated:

> "The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an *independent felonious purpose* . . . ." (Italics added.)

Defendant argues there was insufficient evidence to support the felony-murder special circumstance because evidence that the murder was accidental meant the killing was not accomplished in order to advance an independent felonious purpose. Defendant is wrong.

Although defendant recognizes that the independent felonious purpose requirement is not the equivalent of an added intent or intent to kill requirement, the essence of his argument is that an accidental killing cannot qualify for the felony-murder special circumstance because by definition an accidental killing cannot have been motivated by any purpose. However, the requirement that the killing be committed in order to advance an independent felonious purpose means simply that the felony (in this case robbery) was not merely incidental to

the murder. (*People v. Davis* (1995) 10 Cal.4th 463, 519, fn. 17.) It does not mean that the murder must have been committed with the specific intent or purpose of furthering the robbery. (*Ibid.*)

In other words, the criminal purpose motivating defendant's criminal actions must have been robbery, not merely murder. "The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder." (*People v. Marshall* (1997) 15 Cal.4th 1, 41.) No intent to kill need be found for a felony-murder special circumstance. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147.)

A felony is not merely incidental to the murder if the intent to steal was formed before or during the killing. In *People v. Valdez* (2004) 32 Cal.4th 73, 105, the defendant argued there was insufficient evidence to support the robbery-murder special circumstance because there was insufficient evidence he killed the victim in order to advance the independent felonious purpose of robbery. The court held that to prove the robbery-murder special circumstance, the prosecution need only prove that the defendant formed the intent to steal before or while killing the victim. (*Ibid.*)

Here there was sufficient evidence that defendant intended to commit robbery, that he chose Wilson and Vasquez for that purpose, and that he did not complete the robbery after the shooting because his companions were urging him to leave. Hence, the intent to rob was formed before the killing.

We conclude that even if the killing was accidental, it was not excepted from the application of the felony-murder special circumstance, and there was sufficient evidence to support the jury's finding.

II

Admission of Movie Clip

The prosecution sought to introduce excerpts from the movies, "Men in Black" and "Men in Black II," arguing the clips would help explain defendant's admission during his phone call to Finley. The defense argued the clips had no relevance, would be prejudicial, and trivialized the issue.

In ruling on the matter, the trial court acknowledged that the conversation between defendant and Finley appeared "to be somewhat in code . . . ." The trial court stated that the clip tended to incriminate defendant, to identify him as the killer, and to explain his conversation with Finley. It found the clip had probative value and did not have prejudicial impact. The prosecution was allowed to admit the video clip from "Men in Black," but not from "Men in Black II" because it was a reiteration of what was in the first clip.

The clip was played for the jury. The clip shows two government agents entering a pawn shop and demanding that the pawn shop proprietor show them his weapons. When the proprietor is uncooperative, one of the agents shoots him in the head. The proprietor is apparently an alien, because his head grows back and he says, "You insensitive prick. Do you have any idea how much that stings?"

Following the guilty verdict, defendant made a motion for new trial based in part on the admission of the movie clip. The trial court denied the motion.

Defendant argues the use of this movie clip was irrelevant, and that "[t]he callous comedic depiction bore an obvious potential of gratuitous character prejudice . . . ."

The movie clip was both relevant and non-prejudicial.

Relevant evidence is any evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Defendant's theory of defense was that: (1) he was not the shooter, (2) the shooting was accidental, and (3) the shooting did not occur during the commission of a robbery. The movie clip had the effect of explaining defendant's phone conversation with Finley, which was conducted in code. This phone conversation, in which defendant admitted being the shooter, and claimed it was just like "Men in Black," where the government agent intentionally shot someone in the head, was relevant to the issues of identity, intent, and the absence of mistake or accident.

The evidence was also not unduly prejudicial. Evidence Code section 352 provides that the trial court has the discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Undue prejudice" as expressed in

Evidence Code section 352, does not mean "'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Here, the film clip was relevant in part because defendant's reference to it showed a callous disregard for his victim, which tended to prove defendant's intent and lack of mistake. The film clip was brief and, without context, was not particularly funny. The clip did not show a particularly gruesome dead body after the head shot. On the other hand, there was evidence that the shot that killed the victim in this case obliterated one of the victim's eyes, and scattered his brain matter onto his shoe laces, his car's tire, door, and windshield, and onto the ground. Given the gruesome nature of defendant's crime, the fictional, bloodless depiction of an alien being shot was hardly prejudicial.

Defendant also argues the evidence was cumulative because there was no serious dispute that the killing was accomplished by a close range head shot. However, the evidence was not admitted to prove how the killing was accomplished. Rather, defendant's reference to the movie when discussing the crime tended to show that he was the shooter, that he intentionally shot the victim, and that the shooting was not accidental.

The trial court acted well within its discretion in allowing the jury to view the film clip. Because the evidence was properly admissible, we reject defendant's claims it

violated his constitutional rights of due process and equal protection. (*People v. Gurule* (2002) 28 Cal.4th 557, 652.)

III

Evidence of Uncharged Crimes

During the prosecution's case-in-chief Rimpson testified defendant asked him if he wanted to "hit a lick" and that defendant had robbed people before with Finley. Defense counsel did not object. Defense counsel later called Elaine Stoops as a witness, one of the homicide detectives assigned to investigate the murder. She testified that she interviewed Rimpson on two occasions, and that only on the second occasion did Rimpson tell her defendant asked him about doing a robbery.

On cross-examination, the prosecutor asked Stoops the same questions he asked Rimpson, i.e., if defendant had stated to Rimpson that he had robbed people before with Finley. This time defense counsel objected on the basis of relevance. The objection was overruled.

Defendant now claims the trial court erred in allowing this evidence of uncharged crimes. He claims the evidence was not admissible pursuant to Evidence Code section 1101, largely because there were no details of the prior acts.

Evidence Code section 1101 prohibits the admission of evidence of a person's prior bad acts unless such evidence is relevant to prove some fact such as motive or intent. We review the trial court's admission of prior bad acts evidence for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

In this case, evidence of defendant's prior misconduct is relevant to prove his intent and motive on this occasion notwithstanding the lack of detail regarding the prior act. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Here, defendant's intent to commit a robbery was at issue. Defendant's reason for committing the robbery was to get bail money for Finley. That defendant had committed the same crime before, and that he had done it with another person was relevant to his intent when he armed himself and approached the victims in this case.

Accordingly, the trial court did not abuse its discretion when it overruled defendant's objection to the testimony of detective Stoops.

IV

Felony-Murder Special Circumstance Instruction

The trial court gave CALCRIM No. 730 as follows:

> "The defendant is charged with the special circumstance of murder committed while engaged in the attempted commission of robbery. To prove that this special circumstance is true, the People must prove that:
>
> 1. The defendant attempted to commit robbery;
>
> 2. The defendant intended to commit or intended to aid and abet the perpetrator in committing robbery;
>
> 3. The defendant did an act that caused the death of another person; and

> 4. The act causing the death and the attempted robbery were part of one continuous transaction.
>
> To decide whether the defendant committed attempted robbery, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder."

Defendant argues the trial court should have added the following language, which appears as a bracketed portion of CALCRIM No. 730:

> "In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit robbery independent of the killing. If you find that the defendant only intended to commit murder and the commission of robbery was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved."

Defendant would have been entitled to an instruction pinpointing this issue had he requested it, but he did not make such a request, and the trial court had no obligation to give such an instruction since neither party requested it. (*People v. Silva* (2001) 25 Cal.4th 345, 371.)

Defendant argues his trial counsel was ineffective for failing to request the instruction. The defendant in *People v. Valdez, supra*, 32 Cal.4th at pages 112-113, made the same argument. The Supreme Court rejected the argument, holding that Valdez's claim lacked merit because the additional language Valdez asserted should have been in the instruction was based upon the court's discussion in *Green, supra,* 27 Cal.3d at page

61, which held that the special circumstance applied where a murder occurred during the commission of a robbery, but not where a robbery occurred during the commission of murder. (*People v. Valdez, supra*, 32 Cal.4th at p. 113.) The court held that *Green's* clarification of the scope of the felony-murder special circumstance was not an element of the special circumstance on which the jury must be instructed unless the evidence supports such an instruction.

The evidence did not support such an instruction here. In *Green, supra*, the defendant killed his wife, then stole her clothes, rings, and purse to conceal the identity of the body. (*Green, supra*, 27 Cal.3d at pp. 16-17, 62.) The Supreme Court held that the robbery was insufficient to support a felony-murder special circumstance because Green did not commit the robbery for a reason independent of the murder, then commit the murder. Instead, he committed the robbery to conceal the murder. (*Id.* at pp. 60-62.)

In this case, there was no significant evidence that defendant's intent from the beginning was to murder Wilson, and that he did not form an intent to rob Wilson until after he shot him.[1] Rather, the evidence indicated defendant intended to rob

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[1] Bevans testified that when Wilson first got out of his car he walked toward them with his hand on his hip and she thought he had a gun. Wilson wanted to know what their problem was and if they wanted a fight. Bevans acknowledged that she never saw a gun on Wilson, and that Wilson walked back to his own car before defendant went after him with the shotgun. Her testimony

Wilson and Vasquez before he approached them with a shotgun, and only abandoned the robbery attempt when he shot Wilson. Thus, the court had no duty to give the clarifying language.

V

Involuntary Manslaughter Instruction

Defendant requested an involuntary manslaughter instruction on the theory "that the evidence suggests a brandishing misdemeanor when considered in conjunction with the two statements of my finger slipped, establishing a basis to give an involuntary manslaughter lesser." The trial court found insufficient evidence of a brandishing or accidental shooting to give the requested instruction. Defendant argues the trial court erred when it refused to instruct on involuntary manslaughter and accident, and when it denied his new trial motion on this ground.

We need not determine whether the trial court erred when it refused the instruction because any error was harmless. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Where, as here, the trial court instructs on premeditated first degree murder, first degree felony murder, and robbery-murder special circumstance, and the jury finds

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did nothing to refute the evidence that defendant planned to rob Wilson and Vasquez when he began following their car.

defendant guilty of first degree murder and finds the special circumstance true, any error in failing to instruct on a lesser included offense to first degree murder is harmless. (*People v. Horning* (2004) 34 Cal.4th 871, 906.) If the jury had any doubt that the defendant committed felony-murder, it could have convicted him of first degree murder without the special circumstance. Since it found the special circumstance true, it necessarily found the killing was first degree murder. (*Ibid*.)

VI

Felony-Murder Special Circumstance is Constitutional

Defendant argues the felony-murder special circumstance statute, pursuant to which he received a sentence of life without the possibility of parole, violates the federal and state constitutions. As he recognizes, California's Supreme Court has rejected these claims with respect to the same statute in cases involving the death penalty. He nevertheless raises the claims for purposes of exhaustion of state remedies.

Defendant argues the felony-murder special circumstance is a "vague and indiscriminate dual use of the same facts to support first-degree murder and an LWOP term," violating the Eighth Amendment and depriving him of due process, equal protection, and a jury determination of "the issue." The Supreme Court has considered and rejected this argument several times. (*People v. Abilez* (2007) 41 Cal.4th 472, 528; *People v. Webster* (1991) 54 Cal.3d 411, 456; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.) We likewise reject it.

The Supreme Court has also rejected the claim that the felony-murder special circumstance does not narrow the class of defendants subject to capital punishment, resulting in an arbitrary application of the death penalty. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195; *People v. Gurule, supra,* 28 Cal.4th at pp. 663-664.) We follow the Supreme Court's direction in this matter and conclude there was no constitutional violation.

VII

Marsden Hearing

The probation report contained the following statement of defendant:

> "The defendant stated that he is innocent and that is why he went to trial. He stated his attorney did not call anybody to testify on his behalf. As a result, he wanted to file a motion for inadequate counsel. He remarked that his associate was granted immunity and then lied and implicated the defendant in the incident. He also remarked that his male associate who was in jail was not allowed to testify regarding the meaning of their phone call conversations to clarify their actual meaning."

As a result of this statement in the probation report defendant's trial counsel sent a letter to the trial court stating that although he was preparing a motion for new trial, he would not include inadequacy of counsel as a ground because he was unable to agree with the defendant's assessment. The letter continued: "If, after the court's consideration of all the materials presented, you feel that Mr. Pierce has been

inadequately represented, the appointment of new counsel would be appropriate. [¶] If that is the case, I will ask the court to be released from my representation. If not, I . . . remain prepared to do everything appropriate on Mr. Pierce's behalf."

At the sentencing hearing, the trial court addressed defendant's statement in the probation report. The trial court indicated it did not take the claim seriously in light of the conduct of the trial and the context of the case and the other information in the probation report. The court told defendant that "[a]ll the witnesses who were present at the scene of the crime testified in this particular case, and I know from our discussions through the trial that it didn't seem to me that there were any other material witnesses who could have been called; and I am acting on that assumption."

Defendant now argues he was entitled to a *Marsden*[2] hearing. *Marsden* held that "a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' [Citation.]" (2 Cal.3d at p. 124.)

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

The court's duty to conduct a *Marsden* hearing is not triggered unless there is "some clear indication by defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Accordingly, this court has held that where a defendant bases a new trial motion on inadequate representation, but does not express a desire to obtain substitute counsel to assist in the new trial motion or to provide representation at sentencing, "or for any other purpose going forward," the trial court has no obligation to conduct a *Marsden* hearing. (*People v. Richardson* (2009) 171 Cal.App.4th 479, 485.)

Here, defendant gave no indication that he desired new counsel to represent him as the case moved forward, only that he believed in retrospect that he had received inadequate assistance of counsel. This was insufficient to invoke the trial court's duty to conduct a *Marsden* hearing.[3]

VIII

Sentencing Errors

Defendant argues, and the People concede, that the trial court erred in imposing an unstayed sentence on count 2, the conviction for the attempted robbery of Wilson. When a defendant is convicted of both felony-murder and the predicate felony, Penal Code section 654 forbids double punishment for the

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[3] Defendant asserts the cumulative effect of the errors deprived him of due process, requiring reversal. As there were no instances of multiple error in this case, there can be no cumulative error.

predicate felony. (*People v. Clark* (1990) 50 Cal.3d 583, 637.) Thus, the trial court should have stayed the two-year sentence for count 2, attempted robbery of Wilson.

However, the People argue, and defendant concedes, that if count 2 is stayed, the sentence for count 3 should be increased to two years, because that count is no longer subject to the one-third-the-midterm rule of Penal Code section 1170.1, subdivision (a). Because the one-third-the-midterm rule of section 1170.1, subdivision (a) does not apply to a sentence stayed under Penal Code section 654, the sentence for count 3, attempted robbery of Vasquez, became the principal term. (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.) The trial court should have treated count 3 as the principal term and imposed the midterm of two years for that count. We shall direct the trial court to prepare an amended abstract of judgment reflecting these modifications.

IX

Custody Credits

Defendant claims the trial court erred when it failed to award presentence custody credits of 902 days. Respondent concedes, but counters the correct number should be 903 days. Penal Code section 2900.5 provides that a defendant shall be credited for time served in all felony and misdemeanor convictions. We recognize that defendant has preserved this argument should his conviction be overturned by another court. Otherwise, it is a waste of judicial resources for this court to

consider the argument, since defendant was sentenced to life without the possibility of parole.

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.).

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect that the sentence for count 2 is stayed, and the sentence for count 3 is a two-year term, for a total determinate sentence of two years. The trial court shall forward a copy of the modified abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.